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FILED
DEC 18 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-727

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

TERESA L. CUNNINGHAM,
Petitioner,

v.

HAMILTON COUNTY, OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT HAMILTON COUNTY, OHIO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

1. Should this Court allow Petitioner, an attorney who was disqualified from a case, to take an immediate interlocutory appeal under the collateral-order doctrine from an order levying attorney's fees against her for conduct relating to discovery violations in that case, or must Petitioner wait to file an appeal until final judgment is entered in the case?

2. Where the Circuit Court of Appeals lacks jurisdiction to entertain Petitioner's immediate interlocutory appeal, should Petitioner, who was fully aware of the possibility that her immediate appeal could be dismissed for lack of jurisdiction, be retroactively given an additional opportunity to obtain of appellate review when she did not file a notice of appeal from the order dismissing the underlying case?

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JURISDICTION

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." Respondent, while acknowledging that the Sixth Circuit Court of Appeals is in conflict with other circuits, submits that this conflict is not on a matter of great legal importance and there are no compelling reasons to grant the within Petition and it must be denied.

STATEMENT OF THE CASE

The 42 U.S.C. §1983 lawsuit underlying this Petition arose from the suicide death of inmate Casey Starcher in the Hamilton County Justice Center in Hamilton County, Ohio. Resp. C.A. Br. 3. On behalf of the Estate, Petitioner asserted that Respondent, Hamilton County and Defendant-Appellee Correctional Medical Systems, Inc. (hereinafter "CMS") violated Mr. Starcher's constitutional rights by failing to prevent his suicide while he was incarcerated at the Hamilton County Justice Center ("HCJC"). Id. When the Complaint in this action was filed the Estate's trial counsel was Petitioner, attorney Teresa Cunningham. Id. Unbeknownst to Respondent and CMS, Petitioner was also an important, if not the most important, witness for the Estate. Id.

In March 1996, a scheduling order was issued. The expert identification deadline for the Estate was June 7, 1996, and July 19, 1996, for Respondent and CMS. Id. at 4. To be sure that it received the Estate's responses to its discovery request prior to the July 19, 1996, expert-identification deadline, CMS on May 29, 1996, served the Estate with its first discovery requests. Id. at 5. Due to the expert-

identification date of July 19, 1996, counsel for CMS informed Petitioner, that unless that date was changed, it was necessary for CMS to receive timely and full responses to its discovery requests. However, in response Petitioner stated that those responses would not be made in a timely manner because Darwin Lee Starcher, the administrator of the Estate, had died. Resp. C.A. Br. 5; Pet. C.A. Br. 5, 6; Pet. 3. Petitioner refused to provide any responses to CMS's discovery requests or to provide a commitment as to when they would be made. As a result, CMS, was on July 1, 1996, forced to file a Motion To Compel And For Extension Of Time To Identify Expert Witnesses. Resp. C.A. Br. 5 & 6.

Further, after learning that Petitioner was clearly a witness for the Estate, Respondent and CMS attempted to take her deposition and filed their first two of four motions to disqualify Petitioner as the Estate's trial counsel. Id. at 6. Despite the fact that it was "obvious" that she would be called as a witness for the Estate, Petitioner vigorously opposed these motions. Petitioner's dual role in the litigation (i.e. trial counsel and witness) continued until October 22, 1996, when she was coincidentally disqualified on the same day that the subject Order to pay attorney's fees was issued. Id. at 6; Pet. App. 10a-18a, 31a; Pet. 4.[1]

On July 10, 1996, Magistrate Judge Cook held an informal discovery conference which was attended by all trial counsel, including Petitioner. (By that time Petitioner already

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[1] Although Petitioner was disqualified, she continued to be involved in the matter as detailed in the Response of Appellees Correctional Medical Systems, Inc., To Suggestion For Rehearing En Banc and Respondent's Motion adopting said response. *See also* Section IV. infra.

had had forty (40) days to respond to CMS's discovery requests.) At that conference and in Petitioner's presence, Magistrate Judge Cook rejected the Estate's arguments and objections as to why it had not met its discovery obligations and ordered that:

1. the Estate was required to make full and complete responses to Appellee CMS's discovery requests by 4:00 p.m. on July 12, 1996;

2. the deposition of Rex Smith would be taken on July 25, 1996 in Cincinnati, Ohio; and

3. the deposition of defendants Remillard and Spriggs would be taken on July 25, 1996, only if the Estate complied with the first directive. Resp. C.A. Br. 6 & 7; Pet. App. 2a-3a.

As Magistrate Judge Cook made clear, Petitioner ". . . was advised of and understood the July 12th, 4:00 p.m. deadline at the conference on July 10th." Resp. C.A. Br. 7; Pet. App. 4a; Pet. 3. Of significance, even though CMS's motion to compel was granted, sanctions were not imposed at that time. Resp. C.A. Br. 7.

Yet, on July 12, 1996, Petitioner produced no documents; did not provide any responses to most of the interrogatories, but instead made belated and meritless objections which had already been rejected; made grossly incomplete responses to other interrogatories; made no responses to other interrogatories; and in direct violation of the Order of July 12, 1996, issued a notice and subpoena for the deposition of Mr. Smith in a different city (Indianapolis) and on a different date (July 22, 1996.) Resp. C.A. Br. 7; Pet. App. 4a; Pet. 3. These violations led to a flurry of

motions[2] and a hearing which was held on July 19, 1996.

> At the hearing, Cunningham argued that she should be excused for failing to comply with her discovery obligations both because the defendants had served 'contention' interrogatories, the answers to which allegedly depended on documents to be produced by the defendants and because her client had died and the new administrator of the Starcher estate was not returning her phone calls.

Pet. App. 24a.

Further, during that hearing "all counsel . . . were given the opportunity to argue the various matters raised by motions." Resp. C.A. Br. 8; Pet. App. 5a. Petitioner at no time stated that she needed more time to prepare for the hearing or present her arguments.

> Plaintiff's counsel appeared at the hearing and presented her argument on all the motions. She neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare.

Resp. C.A. Br. 8; Pet. App. 7a-8a.

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[2] *See* Resp. C.A. Br. 8, n.8, for a list of the motions which were filed.

Subsequently, inter alia, Magistrate Cook determined that Petitioner's conduct was "egregious", that she and the Estate had violated the Order of July 12, 1996, and that sanctions should be imposed:

> The Court considers the conduct of plaintiff's counsel to be egregious.

Resp. C.A. Br. 9; Pet App. 25a.

Importantly, the sanctions were imposed pursuant to Fed. R. Civ. P. 37(a)(4) and, not as a result of her having been held in contempt. Resp. C.A. Br. 9, n.9; Pet App.6a-7a, 11a; Pet. 4.

After receiving memoranda supporting and opposing the amount sought in sanctions, on September 25, 1996, Magistrate Judge Cook affirmed his decision to impose sanctions upon Petitioner, and found that she should pay CMS $2,432.00[3] and Respondent $1,494.00. Resp C.A. Br. 9 & 10; Pet. App. 8a; Pet. 4. Petitioner objected to these decisions, yet, the trial court overruled the objections, finding that "Ms. Cunningham's conduct clearly necessitated" the action taken by Appellees and ". . . sanctions were mandated." Resp. C.A. Br. 10; Pet. App. 11a; Pet. 4.

Throughout the above-described events Petitioner continued to refuse to voluntarily withdraw as the Estate's counsel. Resp. C.A. Br. 10. It was not until October 22, 1996 - after the original discovery deadline had already passed - that Petitioner was disqualified as the Estate's counsel.

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[3] Petitioner has separately settled this award with CMS.

> Accordingly, it is "obvious", for purposes of the Disciplinary Rules, that Ms. Cunningham ought to be called as a witness, and the Court ascribes no credibility to her equivocation concerning her intentions.

Resp. C.A. Br. 11; Pet. App. 16a. In addition, almost four months after Respondent and CMS' first attempt to take her deposition, Petitioner was ordered that she was to make herself available for deposition. Resp. C.A. Br. 11; Pet. App. 17a.

Petitioner appealed the sanctions order and on December 11, 1996, Respondent and CMS filed a joint motion to dismiss her appeal on the basis that the Sixth Circuit lacked jurisdiction to hear the appeal. On February 4, 1997, the Sixth Circuit denied the motion to dismiss on the basis that "[t]here is a split among the Circuit Courts of Appeals as to whether an interlocutory award of Rule 11 sanctions against a party's attorney is immediately appealable...(numerous citations omitted)..." Resp. C.A. Br. 13; Pet. App. 19a-20a; Pet. 5. Significantly, the Sixth Circuit made clear that "[i]n light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised" and directed the parties to address the court's jurisdiction in their briefs. Pet. App. 20a.

On May 21, 1998, the Sixth Circuit issued its Opinion in which it held that the trial court's Order of October 22, 1996, was not immediately appealable, and therefore the Court lacked jurisdiction to hear the appeal. Pet. App. 23a. On June 3, 1998, Petitioner filed a suggestion for rehearing en banc which was denied on August 5, 1998, and thereafter, Petitioner filed the within Petition for Writ of Certiorari on November 3, 1998. Pet. i, 1, 2 & 8. On October 9, 1997,

the underlying case was dismissed on the merits. R.187.

ARGUMENT

I. Introduction

At the outset, Respondent acknowledges the split in the Circuit Courts of Appeal regarding whether an interlocutory award of sanctions is immediately appealable and whether a non-party attorney (i.e., due to withdrawal or disqualification) may immediately appeal such an order.[4] Respondent submits that the Sixth Circuit correctly held that an interlocutory award of sanctions is not immediately appealable,[5] correctly applied 28 U.S.C. §1291, and correctly applied the collateral-order doctrine. Respondent respectfully submits that several Circuit Courts of Appeal have erred in their application of the collateral-order doctrine and therefore

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[4] See numerous cases cited and relied upon by Petitioner in her brief and accompanying footnotes, as well as Pet. App. 26a-32a.

[5] See, also, Appeal of Licht & Semonoff, 796 F.2d 564 (1st Cir.1986); Eastern Maico Distrib., Inc. v. Maico-Fahzeugfabrik, 658 F.2d 944 (3d Cir. 1981); Click v. Abilene National Bank, 822 F.2d 544 (5th Cir. 1987); Sanders Assoc., Inc. v. Summagraphics Corp., 2 F.3d 394 (Fed Cir. 1993); G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824 (10th Cir. 1990); and Howard v. Mail-Well Envelope Co., 90 F.3d 433 (10th Cir.) *cert. denied*, 117 S.Ct. 84 (1996). ***But see*** numerous cases in other Circuit Courts of Appeals cited by Petitioner. Pet 5, 8-17 n.4-11.

certiorari is not warranted.[6] Respondent further submits that this is not a matter of great importance and that no compelling reasons exist to grant the Petition. Hence, Respondent requests this Court deny certiorari pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

II. The Sanctions Order Of October 22, 1996, Against Petitioner Is Not A "Final Decision" Under 28 U.S.C. §1291.

It is well settled that the Circuit Courts of Appeal have no jurisdiction other than that which is conferred upon them by statute. U.S. v. Walker, 915 F.2d 1463, 1465 (10th Cir. 1990). 28 U.S.C. § 1291, provides, in relevant part:

> The courts of appeal ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... (Emphasis added.)

In short, an appellate court has no jurisdiction of an appeal from a non-final decision of a district court, and, where an appellate court has been asked to review such a non-final decision, the appeal must be dismissed.

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[6] For example, some circuits have confused the impossibility of review (satisfying the third Cohen factor) with the mere inconvenience of monitoring the case to its conclusion. Pet. App. 32a (citing Howard, supra, at 436. *But See* Pet. 19 (numerous citations omitted.) Further, this Court has recognized "...that orders awarding attorney fees are appealable independent of the disposition of the merits of the underlying case. Pet. App 32a (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199-200 (1988)).

Accordingly, this Court has held that a "final decision" for the purpose of determining appellate jurisdiction is ordinarily defined as one which disposes of all the rights of all of the parties to an action. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-75, 101 S.Ct. 669, 673-674 (1981). Moreover, since the underlying lawsuit involved both multiple claims and multiple parties, the provisions of Fed. Civ. R. P. 54(b) are applicable.

Even a cursory review of the subject Order reveals that it neither fulfills the jurisdictional requirement for the Circuit Courts of Appeals as set forth in 28 U.S.C. § 1291, nor satisfies the definition of a "final decision" established by this Court in Firestone Tire & Rubber Co. v. Risjord, supra. In addition, while the Order clearly deals with "fewer than all of the claims or parties," it is also clear that it does not contain either the "express determination that there is no just reason for delay", or the "express direction for the entry of judgment", which are both required by Fed. Civ. R. P. 54(b) for the Order to be considered final and appealable. Furthermore, this Court has "...held that an order compelling the production of discovery materials is a non-appealable interlocutory order." Pet. App. 26a (citing Alexander v. United States, 201 U.S. 117 (1906)). Accordingly, the subject Order is not a "final" decision pursuant to 28 U.S.C. § 1291.

III. The Order Requiring Petitioner To Pay Sanctions Incurred As A Result Of Discovery Violations, Is Not Immediately Appealable Under The Collateral-Order Doctrine.

Petitioner asserts that she may take an immediate interlocutory appeal from the sanction order issued against her

on October 22, 1996, on the basis of the "collateral-order doctrine", announced by the United States Supreme Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). In Cohen, this Court recognized as appealable a

> ...small class of interlocutory decisions which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated...

Cohen, supra, 69 S.Ct, at 1225-6.

This Court subsequently set forth three distinct requirements for the applicability of the Cohen collateral order doctrine: first, "the order must conclusively determine the disputed question;" second, the order must "resolve an important issue completely separate from the merits of the action;" and third, the order must be "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978). More recently, this Court has explained that the collateral-order doctrine "is best understood not as an exception to the `final decision' rule laid down in [28 U.S.C.] § 1291, but as a `practical construction' of it." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, _, 114 S.Ct. 1992, 1995, 128 L.Ed.2d 842 (1994) (citations omitted).

Respondent submits that, because the subject Order does not meet either the second or the third requirements of the collateral-order doctrine, the collateral-order doctrine does

not apply to the Order of October 22, 1996.

Respondent concedes that the subject Order meets the first requirement of the collateral-order doctrine. However, it clearly does not meet the second requirement, in that the issue of sanctions against Petitioner is not an "important" issue, and it is not an issue "completely separate from the merits of the action."

With regard to the former, it must be remembered that the total amount owed to Respondent is $1,494.00. This sum is neither huge or oppressive. Further, the

> "...risk [of non-repayment by Appellees]...does not, without more, constitute irreparable harm sufficient to qualify an order for immediate review. The same risk is present to some degree in almost every order for sanctions where execution precedes review. *E.g., Evanson* [*v. Union Oil Co. of Calif.*, 619 F.2d 72 (Em. App. 1980), *cert. denied,* 449 U.S. 832, 101 S.Ct. 102, 66 L.Ed.2d 38 (1980)], *supra*, 619 F.2d at 74 (sanction of $60,000 not immediately appealable). To permit an interlocutory appeal in such cases would reverse the general rule of non-appealability. Indeed, only the exceptional order would escape immediate appellate scrutiny. Accordingly, we cannot read either *Cohen* or Section 1291 to confer on us jurisdiction to review order 1 at this time. [Footnote omitted.]

Eastern Maico Distrib., Inc., supra at 948; Resp. C.A. Br. 18.

Thus, it cannot be said that this is an "important" issue, nor can it be said that Petitioner has or will suffer any irreparable harm required for immediate review.

With regard to the requirement that the sanctions issue be "completely separate from the merits of the action", it clearly is not.[7] Although Petitioner claims that "[a] trial judge's decision to sanction an attorney depends upon the behavior of the attorney and not upon the merits of the parties' claims" the subject sanctions were levied against Petitioner as a result of Petitioner's misconduct as Plaintiff's counsel relating to discovery, and her failure to obey a court order relating to discovery. Resp. C.A. Br. 18; Pet. 18. Petitioner's "behavior" resulted in a delay in discovery. Indeed, as a direct result of her refusal to timely and properly answer propounded discovery, Respondent was forced to file a motion for extension of time to identify its expert witness(es). Further, in order to assess whether the trial court abused its discretion in levying the subject sanctions, the Court would have to consider the merits plaintiff's allegations against defendants, and then decide the importance of Petitioner's misconduct which led to her being sanctioned. Resp. C.A. Br. 18. In many ways, this case is substantially similar to Eastern Maico Distrib., Inc., supra, wherein the Court stated, at 658 F.2d 947:

> "...As to the second [Cohen] criterion, the discovery activity at issue here is not

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[7] It is important to note that some of the Circuit Courts which have held similar orders to be completely separate from the merits of the action "...have since recognized its significant potential for disruption of the trial process." Pet. App. 29. (numerous citations omitted).

> completely collateral to the underlying action. In order to address the question whether the documents requested by plaintiffs were truly relevant, we would have to consider the charges against the defendants and reach some conclusion as to the relative importance of the discovered material. *Cf. Evanson, supra,* 619 F.2d at 74 (sanction for failing to answer interrogatories truthfully is not collateral to main issue and therefore is not directly appealable); *Borden Co.* [*v. Sylk*, 410 F.2d 843 (3d Cir. 1969)], *supra*, 410 F.2d at 846 (challenge to discovery order on relevance grounds is clearly not collateral to substantive litigation)..."

Hence, it is patently obvious that an immediate appeal would cause disruption of the underlying litigation and further inefficiency which would undoubtedly result in even more delays of the underlying case, further frustrating the rights of the litigants to have the merits of the case resolved. Therefore, the Order of October 22, 1996 fails to meet the second requirement of the collateral-order doctrine.

Petitioner knew that she was a key fact witness for plaintiff which resulted in her disqualification. Yet, Petitioner argues that "... attorney sanctions orders cannot be analogized to orders disqualifying counsel..." because "[a]ppeals of disqualification orders directly affect the ongoing district court litigation..." Pet. 20. (citing Richardson-Merrell, Inc., v. Koller, 472 U.S. 424, 431 (1985.) However, the sanctions issue in this case is obviously inextricably intertwined with the merits of underlying action and Petitioner's argument that due to her disqualification, an appeal in this circumstance "...cannot interfere with ongoing district court proceedings"

is incorrect. Pet. 20. As stated above, Petitioner's conduct did in fact interfere with the ongoing district court proceedings. Additionally, because Petitioner was a key fact witness, she had a continuing interest in and connection to the underlying case. Thus, as the Sixth Circuit stated, "...it would be strange if the fact of disqualification permitted an attorney to take an immediate appeal of a discovery order, but did not permit an immediate appeal of the disqualification order itself." Pet. App. 31a (citing Richardson-Merrell, Inc. supra.)

With regard to the third requirement of the collateral-order doctrine, Respondent submits, the most relevant and persuasive authority, is the case of Howard, supra. In Howard, Petitioner, who had been counsel for plaintiff, was sanctioned for misconduct and removed from the underlying district court action prior to appealing from the order by which he was sanctioned and removed. Further, in Howard, the underlying civil action was still pending in the district court at the time of the appeal, and there was "...no difficulty concluding the order challenged in this case does not amount to a `final decision[ ] of the district[ ] court' within the meaning of 28 U.S.C. § 1291..." Id., at 436; Resp. C.A. Br. 19.

The Howard Court went on to conclude that the collateral-order doctrine did not apply and that it lacked jurisdiction over the appeal because the order appealed from failed to meet the third requirement of the doctrine, i.e., the order was not effectively unreviewable absent an interlocutory appeal. Id. The Court found this to be true for three reasons, each of which applies with equal validity in this case. First, the challenged decision "...may be effectively reviewed in an appeal from a final judgment, even if the parties settle their dispute or otherwise elect not to appeal...". Second, the

rationales underlying the conflicting decisions from the other Circuit Courts of Appeals are faulty because "...an attorney may appeal a sanction or disqualification order even if his former client settles or does not appeal..."[8], and those other

> ...circuits' analyses improperly blur the line between the impossibility of effective review necessary under the Cohen doctrine and mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal....

And third, "...the mere fact the sanction order in this case is currently due in full does not give rise to the type of irreparable harm justifying review under the collateral-order doctrine..." Id., at 436-7. The Howard Court went on to observe:

> ...We see no reason to create an exception to this general rule and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary, nor could such a holding be reconciled with our decision in *G.J.B & Assocs.* [v. *Singleton*, 913 F.2d 824 (10th Cir. 1990)]. We also see no reason to permit an immediate appeal under *Cohen* so that Mr.

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[8] Petitioner's argument regarding settlement agreements and conflicts of interest are ill-founded because an attorney owes a duty to act in his/her client's best interest first and foremost. Pet. 18-19, nn.12-13.

> Smith can, without delay, attempt to somehow rehabilitate his reputation by persuading us to set aside the district court's decision. Mr. Smith's interest in promptly diminishing the stigma associated with the district court's decision is no greater than Mr. Dickstein's... Id., at 437.

(See also United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992) - revocation of permission to appear *pro hac vice* in a criminal case is not immediately appealable.)

Respondent respectfully submits that the Howard Court's reasoning is a sensible and valid analysis, and is applicable to Petitioner's misconduct in this case as it was to the misconduct in Howard. There simply is no good, valid or compelling reason to allow Petitioner an immediate appeal of the monetary sanctions levied for her "egregious" misconduct committed during the time she wrongfully, knowingly and tenaciously chose to maintain her flagrantly impermissible dual status as trial counsel and fact witness for plaintiff. Thus, because the order appealed from herein clearly does not meet the third requirement of the collateral-order doctrine (i.e., it is not effectively unreviewable absent an interlocutory appeal), it is not appealable under that doctrine. Resp. C.A. Br. 20.

IV. Petitioner Did Not File A Notice Of Appeal From The Order Dismissing The Underlying Case Even Though She Was Aware That The Sixth Circuit Court Of Appeals Could Dismiss Her Immediate Interlocutory Appeal For Lack Of Jurisdiction And She Is Therefore Not

Entitled To Have An Additional Opportunity To Obtain Appellate Review.

Petitioner failed to file any notice of appeal from the order of October 9, 1997 dismissing the underlying case. Therefore the Sixth Circuit was without jurisdiction to review the order levying attorney's fees. Pet. App. 23a. In fact, the Sixth Circuit stated that "...the mere fact that she may be unable to obtain appellate review does not enter into our jurisdictional analysis. Pet. App. 27a. Petitioner, in her questions presented for review, suggests that because the "...ruling below announced a new rule of appealability..." the court's decision should be applied prospectively. Pet. i. Yet, regardless of whether a new rule of appealability was announced, the failure to file a notice of appeal did not give the court jurisdiction to review the merits decision. Budinich, supra, at 203 (numerous citations omitted.)[9]

Importantly, Petitioner was aware of the distinct possibility that her appeal could be dismissed for lack of jurisdiction and still failed to file a notice of appeal from the order dismissing the underlying case. Specifically, in their February 4, 1997, Order, the Sixth Circuit Court of Appeals explicitly stated that "[i]n light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised...The parties are directed to address the court's jurisdiction in their appellate briefs." Pet. App. 20a. Clearly, at that time and while the underlying case was

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[9] Budinich held that "a decision on the merits is a 'final decision' for purposes of §1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." Id. 202-203.

still pending, Petitioner was undoubtedly on notice of the distinct possibility that her appeal could be dismissed for lack of jurisdiction.

Furthermore, the Sixth Circuit's decision did not produce any inequitable results in this case. Specifically, although Petitioner was disqualified she continued to be involved in the matter. Specifically, on July 7, 1997, Petitioner filed a motion by which she requested the district court judge to recuse herself in the determination of subsequent sanctions. R.174. Additionally, in November, 1996, Petitioner's deposition as a fact witness in the underlying case was taken.[10] Lastly, from February 11, 1997, until March 23, 1998, Petitioner actively litigated the issue of whether additional monetary sanctions would be imposed on her. On March 23, 1998, the trial court having found among other sanctionable conduct that Petitioner had "perpetuated a fraud upon the Court...," imposed monetary sanctions in the amount of $29,000.00.[11] R.200.

Clearly, Petitioner was still actively involved in the case both as a lawyer when she filed a recusal motion and fought against the imposition of additional sanctions, and as a fact witness for the Estate. Accordingly with the actual knowledge that the possibility that her appeal could be dismissed and familiarity with the status of the underlying case, Petitioner knew or should have known that in order to

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[10] See Response of Appellees Correctional Medical Systems, Inc. To Suggestion For Rehearing En Banc and Respondent's motion adopting said response. Resp. 3-5.

[11] The sanctions award in the amount of $29,000.00 imposed upon Petitioner were awarded to CMS only and a satisfaction of judgment has since been entered. R. 217.

protect herself, a notice of appeal of the Order dismissing the underlying case had to be filed. Therefore, she cannot, at this late date, complain that she has no avenue for appellate review even if "...the ruling below announced a new rule of appealability...", nor may she complain that this has led to an inequitable result in this case. Thus, it is distinguishable from the holding in G.J.B. & Assoc., Inc., supra., where the Tenth Circuit did not allow its holding to apply retroactively.

V. Several Circuit Courts Of Appeal Have Erred In Their Application Of The Collateral-Order Doctrine And Therefore Certiorari Is Not Warranted.

Petitioner has cited to numerous cases demonstrating the split among the Circuit Courts of Appeals and their treatment regarding whether an interlocutory sanction award is immediately appealable.[12] However, of the circuits which permit immediate appeals, the Second, Seventh, Eighth and Ninth,

> ...some of those circuits that initially embraced the idea that an attorney could immediately appeal an order imposing discovery sanctions have since recognized its **significant potential for disruption of the trial process.** The Second Circuit, for example, recently noted that its precedent permitting attorneys immediately to appeal sanctions orders led to a 'flurry of arguments, charges and countercharges...that effectively diverted for far too long the attention of the parties and the district court from the merits of the underlying

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[12] See Pet. 5, 8-17 n.4-11.

> ...litigation." Pet. App. 29a (citing Ted Lapidus, S.A. v. Vann, 112 F.3d 91, 96 (2nd Cir. 1997)). (Emphasis added.) In light of the practical effects of its precedent, the court went so far as to say that '[w]ere we writing on a clean slate, we would be tempted to confine *Cheng*[13] to its unusual facts and characterize the sanctions order here as nonappealble under the *Cohen* doctrine.' *Ibid.* Similarly, the Seventh Circuit recently acknowledged that its precedents permitting immediate appeals by sanctioned attorneys 'ha[ve] not played to universal acclaim,' and noted that extension of these precedents 'would produce a substantial and unjustified, erosion of the final-decision requirement.

Pet. App. 29a. (citing Cleveland Hair Clinic, Inc. v. Puig, 104 F.3d 123, 125 (7th Cir. 1997)).

Moreover, Respondent submits that Petitioner's sanction herein, $1494.00, is neither huge nor oppressive and is not an "important" issue under Cohen. Thus, Petitioner would arguably not be permitted to file an immediate appeal in the Eleventh Circuit.

Additionally, due to Petitioner's continued interest in and connection to the underlying case, she would arguably not have been permitted to file an immediate appeal in either the Fifth or Third Circuit Courts of Appeals.

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[13] Cheng v. GAF Corp., 713 F.2d 886 (2nd Cir. 1983).

CONCLUSION

Clearly, the order imposing sanctions against Petitioner is neither a final decision of the trial court pursuant to 28 U.S.C. §1291, nor under case law interpreting §1291, nor a decision to which the collateral-order doctrine applies. As such, it was taken in violation of 28 U.S.C. §1291, Fed.R.Civ.P. 54 and relevant and well established case law.

Additionally, a broad rule permitting interlocutory appeals of sanctions awards will encourage piecemeal litigation and inevitably delay the trial proceedings. It would further serve to reward attorneys for egregious conduct by granting them rights not granted to those attorneys who conduct themselves properly. For example, in this case, Petitioner was sanctioned on more than one occasion.

> In complicated multiple party cases, the potential exists for repeated sanctions over an extended period of time, each one of which could result in an immediate appeal...strict adherence to the requirements of 28 U.S.C. §1291 will have the collateral effect of reinforcing the necessary deference to the trial court's broad discretion in managing cases, including the imposition of sanctions. Attorneys...will be fully aware that they must bear the burden of sanctions to the conclusion of the case...

D & H Marketers v. Freedom Oil & Gas, 744 F.2d 1443, 1446 (10th Circuit 1984)(en banc).

> Indeed, it would be ironic to allow an appeal from a sanction order, inevitably delaying

> lower court proceedings, when that order may have resulted from tactics that already unjustifiably delayed the proceedings.

G.J.B. & Associates, Inc. supra.

Further, expanding the collateral-order doctrine to include immediate interlocutory appeals from sanction orders would undoubtedly make the trial process more about the attorneys rather than the litigants whom the attorneys represent. There is simply

> ... no reason to create an exception to this general rule and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary....

Howard at 437.

Accordingly, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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